UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

OAKVIEW CONSTRUCTION, INC., an Iowa corporation, Plaintiff, vs. HUFFMAN BUILDERS WEST, LLC, a Nevada limited liability company; VENTURE CORPORATION, a California corporation; DOES I through X; ROE CORPORATIONS I through X, Defendants.	2:10-cv-00984-ECR-RJJ **Order**

This case arises out of an alleged breach of a construction services contract. Plaintiff alleges five causes of action for: (i) breach of contract against Huffman Builders West LLC; (ii) successor liability against Venture Corporation; (iii) breach of implied covenant of good faith and fair dealing against Huffman Builders West LLC and Venture Corporation; (iv) unjust enrichment or, in the alternative, quantum meruit, against all Defendants; and (v) violation of Nevada Revised Statutes § 624. Venture Corporation has filed a motion (#21) for summary judgment. The motion is ripe, and we now rule on it.

I. Factual Background

Oakview Construction, Inc ("Oakview") is an Iowa corporation and licensed Nevada contractor doing business in Clark County, Nevada. (Compl. ¶ 1 (#1 Ex. A).) Defendant Huffman Builders West LLC ("Huffman") is a Nevada limited liability company. (Id. ¶ 2.) Huffman was the sole member of Hualapai Pavilion Commons LLC ("Hualapai"). (Id.) Defendant Venture Corporation ("Venture") is a California corporation doing business in Clark County, Nevada. (Id. ¶ 3.) On or about January 25, 2006, Oakview entered into a written agreement with Hualapai to provide construction services for Hualapai on property located at Hualapai Pavilions, 10115, 10135, 10155, 10175 and 10196 West Twain Avenue, and 3820 South Hualapai Way, Las Vegas, Nevada (the "Project"). (Id. ¶ 5.) On or about May 24, 2006, Oakview entered into another written agreement with Hualapai to provide additional construction services on the Project (all construction services provided by Oakview under the agreements hereinafter referred to as the "Work," and the agreements collectively referred to as the "Contracts"). (Id.) Oakview asserts that during the course of Oakview's performance under the Contracts, Hualapai and Defendants issued change orders and work orders to Oakview that expanded Oakview's scope of work under the agreements and materially changed the Work, increasing Oakview's costs to perform the Work. (Id. ¶ 6.) Hualapai failed to pay the amounts due to Oakview under the Contracts. (Id. ¶ 8.) On November 20, 2006, Huffman agreed in writing to pay Oakview $498,155.58 of the amount due under the Contracts in consideration of Oakview's continued performance of the Contracts and in order to facilitate

Huffman's financing of the additional costs of the additional and changed construction services outside of its construction loan for the Project (the "Letter Agreement"). (Id. ¶ 9.) Pursuant to the Letter Agreement, Oakview was entitled to payment at the time each of the six buildings units of the Project was sold, on a pro rata basis, based on the contract value of each unit. (Id.) In or about March 2007, Oakview asserts that Venture purchased the assets and certain liabilities of Huffman, including Huffman's liabilities under the Letter Agreement. (Id. ¶ 10.) Nearly all of the units of the Project have now been sold or leased by Defendants. (Id. ¶ 11.) Between September 2007 and July 2008, after Venture's alleged acquisition of Huffman, Oakview was paid $228,839.67 pursuant to the terms and conditions of the Letter Agreement for the sale of certain of the building units. (Id. ¶ 12.) Oakview asserts that it has received none of the payments due in conjunction with the sale of the remainder of the units. (Id. ¶ 12.) As of February 5, 2010, the principal amount owing under the Letter Agreement was $269,315.91 (the "Outstanding Balance"). (Id. ¶ 13.)

II. Procedural Background

Plaintiff filed its complaint (#1 Ex. A) in the Eighth Judicial District Court in Clark County, Nevada on May 27, 2010. Venture removed the action (#1) to this Court on June 22, 2010. Venture filed its answer (#5) on June 29, 2010. On January 26, 2011, Venture filed its motion (#21) for summary judgment. Plaintiff opposed (#26) and Venture replied (#31). The motion is ripe, and we now rule on it.

III. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. N.W. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form — namely, depositions, admissions, interrogatory answers, and affidavits —

only evidence which might be admissible at trial may be considered by a trial court in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: (i) it must determine whether a fact is material; (ii) it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (iii) it must consider that evidence in light of the appropriate standard of proof. Anderson, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999). "As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. Disputes over irrelevant or unnecessary facts should not be considered. Id. Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. Id.

IV. Defendant Venture's Motion (#21) for Summary Judgment

Venture asks the Court to dismiss Venture from this action in its entirety with prejudice because: (i) no genuine issues of material fact remain for trial; and (ii) Oakview has failed to state

a claim upon which relief may be granted because: (a) Venture does not own any interest in the Project; (b) Venture did not acquire any interest in or assets or liabilities of Huffman; (c) Venture is not a successor in interest to the Letter Agreement; and (d) Venture did not enter into any contracts with Oakview for the construction of the Project.

Venture alleges that the sole member of Hualapai is Venture Professional Centers, LLC ("VPC LLC"), a California limited liability company qualified to do business in Nevada. (Mot. for Summary Judgment at 4 (#21).) Venture claims that "Venture Corporation" was a "trade name/dba" filed in approximately 1980 for a California corporation named Venture Development Corporation, which was formed in or about 1976 and subsequently underwent a name change to Tamal Mt., Inc.. (Id.) Venture Development Corporation d/b/a Venture Corporation was hired by Hualapai to act as project manager and oversee the development, marketing and sale activities for the Project. (Id. at 4-5.) In this role, Venture was not a party to any contracts for the construction of the Project and had no control over the Project's funds. (Id. at 5.) Venture further contends that it did not purchase Huffman, any of its assets or liabilities, nor did it assume or succeed to any of Huffman's contract liabilities. (Id.) Venture also did not purchase, was not assigned and does not own any interest in VPC LLC. (Id.)

For its part, Oakview contends that it was not aware of the existence of VPC LLC until the start of the present litigation and was under the impression that Venture had assumed the obligations of the Letter Agreement. (Resp. to Mot. for Summary Judgment at 3

(#26).) Oakview asserts that a genuine issue of material fact exists as to whether Venture had apparent authority to make payment under the Letter Agreement on behalf of Robert Eves and VPC LLC, the successors in interest to membership interests in Hualapai. Oakview believed that Venture had authority to perform under the Letter Agreement and Venture actually caused payment to be made to Oakview in accordance with the Letter Agreement. (Id. at 4.)

In Nevada, an agent binds a principal when it acts under "actual . . . or apparent authority." See Dixon v. R.H. Thatcher, 742 P.2d 1029, 1031 (Nev. 1987). Apparent authority is "that authority which a principal holds his agent out as possessing[,] or permits him to exercise or . . . represent himself as possessing, under such circumstances as to estop the principal from denying its existence." Id. "Apparent authority is, in essence, an application of equitable estoppel, of which reasonable reliance is a necessary element." Great American Ins. Co. v. General Builders, Inc., 934 P.2d 257, 261 (1997). "Apparent authority, including a third party's reasonable reliance on such authority, is a question of fact." Id. (emphasis in original).

Restatement (Second) of Agency notes that "apparent authority is created when a principal writes, speaks, or acts in a way which causes a third person to reasonably believe that the principal consents to the acts fo the agent." Restatement (Second) of Agency § 27 (2005). Apparent authority is created where both the third party and the principal know of the actions of the agent, and the principal fails to object even though it could have easily done so. Id. at § 43 cmt. e.

Venture contends that the existence of apparent authority is not material to whether Oakview alleged a viable cause of action against Venture. (Reply to Mot. for Summary Judgment at 3 (#31).) We agree. Even if Venture had the apparent authority to make payments under the Letter Agreement, Venture's actions or inactions as an agent with apparent authority would only be imputed to and would only bind the principal, not Venture. Tsouras v. Southwest Plumbing & Heating, 587 P.2d 1321, 1323 (1978)(holding that "[a]pparent authority (when in excess of actual authority) proceeds on the theory of equitable estoppel: it is, in effect, an estoppel against the alleged principal to deny agency when by his own conduct he has clothed the agent with apparent authority to act."). Oakview offers no authority to suggest that Venture would itself be bound to make payments under the Letter Agreement as an agent of Huffman with apparent authority. (Resp. to Mot. for Summary Judgment at 3 (#26).) Oakview also does not assert that Venture executed any contract or agreement on behalf of Huffman. (Id.) Rather, Oakview appears to suggest that Venture was acting on behalf of either VPC LLC or Robert Eves as principal, although neither party is named in this lawsuit, and Venture offers no evidence that either party was in privity of contract with Oakview with respect to the Contracts or the Letter Agreement. (Id. at 4.)

Venture correctly states that a "mistaken belief does not create a genuine issue of material fact." (Reply to Mot. for Summary Judgment at 6 (#31).) As the party opposing a motion for summary judgment, Oakview has the burden of proof to offer admissible evidence that Venture assumed or otherwise became

obligated to pay the remaining debt claimed by Oakview pursuant to the Letter Agreement. See Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). Here, Oakview has not offered any evidence as to how Huffman's obligations under the Letter Agreement became obligations of Venture. The only evidence offered by Oakview is a series of invoices sent to Venture and checks paid by Nevada Title Company to Oakview as a pro rata payment from the sale of building units. (Resp. to Mot. for Summary Judgment Ex. 2 (#26).) These checks identify the seller as Huffman, not Venture, and do not provide any evidence that Venture had assumed the obligations of Huffman under the Letter Agreement. Oakview has, therefore, failed to present any evidence to support its contention that there is a genuine issue of material fact as to whether Venture assumed the obligations of the Letter Agreement and so may be held liable for payments due Oakview thereunder by the doctrine of apparent authority.

V. Conclusion

Venture has moved for summary judgment on the basis that: (i) no genuine issues of material fact remain for trial; and (ii) Oakview has failed to state a claim upon which relief may be granted. Venture asserts that it does not own any interest in the Project; (b) did not acquire any interest in or assets or liabilities of Huffman; (c) is not a successor in interest to the Letter Agreement; and (d) did not enter into any contracts with Oakview for the construction of the Project. For its part, Oakview contends that there exists a genuine issue of material fact as to whether Venture assumed the obligations of the Letter Agreement

under the doctrine of apparent authority. We have found that such an issue of material fact does not exist.

IT IS, THEREFORE, HEREBY ORDERED that Venture's motion (#21) for summary judgment is **GRANTED** and Defendant Venture is dismissed from this case.

Judgment will not be entered until all parties and all claims have been disposed of.

DATED: August 25, 2011.

Edward C. Reed.

UNITED STATES DISTRICT JUDGE